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No. 99-1844

Supreme Court, U.S.
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In the Supreme Court of the United States

IN RE POTASH ANTITRUST LITIGATION

HAHNAMAN ALBRECHT, INC., ET AL.,
PETITIONERS,

v.

POTASH CORPORATION OF SASKATCHEWAN, INC., ET AL.
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence of conspiracy in this Sherman Act § 1 case, which both the district court and the court of appeals found to be speculative and "far too ambiguous" to be probative, "'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752, 764 (1984)).

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RESPONDENT'S BRIEF IN OPPOSITION

The decision below rests on the routine application of settled legal principles. Applying the standards prescribed by the Court in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752 (1984), the en banc Eighth Circuit held that antitrust plaintiffs may not survive summary judgment if they fail to "present evidence that 'tends to exclude the possibility of independent action' by the defendants." Pet. App. A6 (quoting *Monsanto*, 465 U.S. at 768). After reviewing the evidence in this case under that standard, the court of appeals affirmed the district court's conclusion that the plaintiffs, the petitioners in this Court, "failed to present evidence of collusion sufficient to create a genuine issue of material fact." Pet. App. A19. The court of appeals therefore held that the defendants, respondents in this Court, were entitled to summary judgment.

Petitioners' challenge to the ruling below rests on a manifest mischaracterization of the court of appeals' holding. That court plainly did *not* hold, as petitioners would have it, that a "court, acting as a finder of fact, will weigh circumstantial evidence as it sees fit" (Pet. 5), or that antitrust plaintiffs are obligated to advance evidence constituting "the offer and acceptance of a particular price-fixing transaction." Pet. 7. To the contrary, the court of appeals expressly *disavowed* any such analysis. See Pet. App. A6. And, of course, petitioners advance the same red herring when they assert that the Eighth Circuit's holding conflicts with the decisions of other courts of appeals. In fact, there is no disagreement among the courts of appeals on the controlling standard; the Eighth Circuit either distinguished on factual grounds or *relied upon* the assertedly conflicting rulings.

Indeed, over the last two years this Court has denied certiorari in no fewer than five cases that presented precisely the same chimerical allegation of a conflict concerning the antitrust summary judgment standard. See *Gangi Bros.*

Packing Co. v. *Cargill, Inc.*, No. 99-1218, 120 S. Ct. 1531 (2000); *Super Sulky, Inc.* v. *United States Trotting Ass'n*, No. 99-67, 120 S. Ct. 172 (1999); *Harcros Chemical, Inc.* v. *City of Tuscaloosa*, No. 98-1997, 120 S. Ct. 309 (1999); *Amerisource Corp.* v. *HJB, Inc.*, No. 97-1148, 523 U.S. 1040 (1998); *Corner Pocket of Sioux Falls, Inc.* v. *Powerhouse Tech., Inc.*, No. 97-1097, 522 U.S. 1117 (1998). See also *Moyer Packing Co.* v. *Petruzzi's IGA Supermarkets Inc.*, No. 93-601, 510 U.S. 994 (1993). That disposition also would be appropriate here.

STATEMENT

1. Plaintiffs' argumentative statement of facts repeatedly asserts, in conclusory terms, that the defendants engaged in "joint action." Pet. 8, 9.[1] In fact, however, the developments that dictated potash price movements — which are essentially undisputed — have nothing to do with an agreement among the defendants.

It is uncontested that the North American potash industry is an oligopoly characterized by interdependence among firms. See Pet. App. A4. It also is undisputed that the industry has been the object of protectionist trade policies by the governments of both the United States and Saskatchewan. This combination of an oligopoly market structure and government intervention has produced dramatic ups and downs

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[1] Petitioners' characterization of the record is not supported by the documents they cite at Pet. 8-9; in every case, these documents suggest only an awareness of pricing interdependence. As explained by Professor Areeda, interdependence exists in an oligopoly market where "each firm is aware of its impact on the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other * * * firms [in the market]." VI P. Areeda & H. Hovenkamp, ANTITRUST LAW 175 (1995).

in potash prices over the past 25 years. The price roller coaster hit its low in the mid-1980s when respondent PCS — a corporation, then owned by the Province of Saskatchewan, that had by far the largest production capacity of any firm in the industry — greatly expanded its production. PCS pursued this strategy for political reasons, seeking to bolster employment in Saskatchewan and to pump money into the provincial economy. See *id.* at A5. The Saskatchewan government, however, miscalculated future potash demand, which fell during the early 1980s. As petitioners recognize (Pet. 8), the decline in demand at a time of dramatically increased production predictably led to a price war. By October 1986 the real price of potash had fallen to historically low levels. Pet. App. A5.

Following the provincial elections at the end of 1986, the Saskatchewan government prepared to privatize PCS. Pet. App. A5, A111-A112. To implement this shift in focus — from maintaining employment through high levels of production to achieving profitability by scaling production to demand — PCS replaced its upper-level management in the first quarter of 1987. The new executives were to carry out the Province's mandate to make the company profitable, the better to attract investors. *Ibid.*

At about the same time that PCS management changed, potash prices in the United States had fallen so far that two American potash producers petitioned the U.S. Department of Commerce ("DOC") to initiate an antidumping proceeding against the Canadian producers. Pet. App. A5. In August 1987 the DOC made a preliminary determination that Canadian imports were being sold at less than fair value; the DOC ordered the Canadian companies to pay cash deposits or post bonds on future exports to the United States in amounts equal to preliminary "dumping margins" set for each Canadian producer. *Id.* at A5, A112-A114. The DOC subsequently negotiated a compromise "Suspension Agreement" with each

of the Canadian producers that was designed to end the dumping inquiry by raising the price of Canadian potash sold in the United States. The Agreement was executed by the DOC and the Canadian producers on January 8, 1988. *Id.* at A8-A6, A115-A116. It provided a formula to use in determining the minimum price at which each Canadian producer could sell potash in the United States.

Saskatchewan, meanwhile, viewed the antidumping proceeding as an attack on its economy. The Province reacted to the DOC's preliminary dumping determination by enacting so-called "prorationing" legislation, which authorized both the imposition of mine-by-mine limits upon the rate of potash production and the allocation of the amount of production that would be permitted at each mine. The legislation, which was intended to discourage Canadian producers with low margins from undercutting the prices of higher-margin producers, was approved by the provincial legislature in September 1987. Pet. App. A114-A115.

These events necessarily caused potash prices to increase in 1987 and 1988. Following the DOC's announcement of the preliminary dumping margins in August 1987 and the introduction of Saskatchewan prorationing legislation in September 1987, PCS announced a $35 (U.S.) surcharge to its base list prices of approximately $60 per ton, adding that the surcharge would be refunded if the dumping action were resolved without the imposition of final dumping duties. Pet. App. A115.[2] Over the next several weeks the PCS price

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[2] While petitioners find it suspicious that this amount "was significantly lower than PCS' margin" (Pet. 9), the testimony concerning the origin of the $35 surcharge was uncontested: PCS chose the $35 figure because it covered the anticipated *industry average* dumping bond liability resulting from the preliminary margins. Plaintiffs' CA App. 983-985; Defendants' CA App. 406-407, 378. PCS expected that use of the industry average would

increase was followed first by nondefendant offshore producers (who did not face dumping liability) and then by other Canadian producers (who did face a dumping risk). *Ibid.*[3]

After entry of the Suspension Agreement in January 1988, PCS followed through on its promise to its customers to rebate the $35 surcharge. Pet. App. A117. Under pressure from their own customers, other Canadian producers — which had not promised rebates — also rebated some or all of the surcharge. See *ibid.* As a result of these rebates, real potash

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encourage other Canadian producers to impose, individually, a similar surcharge — a development that, in turn, would induce American farmers and consumers to pressure Congress and the DOC to terminate the antidumping proceeding. Pet. App. A143; Plaintiffs' CA App. 985; Defendants' CA App. 273, 283, 307-310, 378. Petitioners also purport to find some inconsistency between the imposition of the $35 surcharge in September and concerns expressed by PCS's president some four months earlier, in May 1987, that PCS might be injured by the imposition of a high dumping margin. Pet. 10. In fact, however, concerns about a high *individual* margin for PCS motivated — and are wholly consistent with — PCS's use of the *industry average* in computing its surcharge. Moreover, as the district court noted, PCS could simply have rescinded the surcharge had the price increase not been followed by its competitors, as it and other producers had rescinded past price increases. See Pet. App. A112; VI P. Areeda & H. Hovenkamp, *supra*, at 150.

[3] Petitioners assert that after imposition of PCS's surcharge "all Saskatchewan producers promptly added a $35 surcharge." Pet. 9. In fact, action by other producers was neither prompt nor uniform. See Defendants' CA App. 1-6, 8, 12-14, 110, 118-119, 131-132, 148-149, 231-233, 264-265, 268-269. Indeed, one non-Canadian defendant *undercut* the Canadian prices (it raised its prices by only $13.50 per ton for the balance of 1987). Defendants CA App. 141-142.

prices fell well below their September 1987 post-surcharge levels. *Id.* at A6. Thereafter, real U.S. potash prices continued to move downward during the alleged conspiracy period. *Ibid.*

2. Petitioners challenged respondents' pricing policies under Section 1 of the Sherman Act and, after extensive discovery, respondents moved for summary judgment. The district court granted the motions, adopting the magistrate judge's comprehensive, 144-page opinion. Pet. App. A104-A220. After a detailed review of the factual background (*id.* at A104-A119), the court explained that "'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case,'" so that a jury may not "'infer the existence of a conspiracy from ambiguous evidence.'" *Id.* at A122, A123 (quoting *Matsushita,* 475 U.S. at 588, and *Lovett* v. *General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993)). This standard assures that "lawful conduct is not, inadvertently, condemned and penalized." *Id.* at A125.

In reviewing an antitrust plaintiff's evidence, the court continued, "the existence of mere parallel pricing[] in an oligopoly, is not, standing alone, actionable." Pet. App. A127. Instead, "it is now settled antitrust law that only when the plaintiff shows the existence of * * * additional evidence — often referred to as 'plus factors' — does the evidence tend to exclude the possibility that the defendants were actually acting independently." *Id.* at A128. In reviewing that evidence, the district judge added, "the Court should not compartmentalize the evidence that is proffered by an antitrust plaintiff but, rather, should analyze the plaintiff's showings as a whole so as to determine if, in its integrated entirety, the evidence supports an inference of concerted action." *Id.* at A124. The court also noted that "'[o]n summary judgment[,] the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion.'" *Id.* at A122 (citation omitted). But "where an

examination of the proffered 'plus factors' leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of Summary Judgment." *Id.* at A129. In applying this standard, the court engaged in an "exhaustive * * * appraisal of the evidentiary showings that the Plaintiffs regard as demonstrating the existence of triable issues of price fixing" (*id.* at A130-A131) —although in doing so the court "accept[ed], without reservation, [its] incapacity to adjudge, under the rubric of Rule 56, the credibility of the evidence." *Id.* at A131.

Turning to the record, the court noted that, "[g]iven the sheer volume" of materials presented by plaintiffs, "there is an instinctive natural inclination to presume that such a daunting collection of documents must, *a fortiori*, generate triable issues of fact." Pet. App. A132-A133. The court's consideration of the evidence, however, "convincingly persuaded [it] otherwise." *Id.* at A133. "After a most painstaking review," the court found that petitioners' evidence "is, quite literally, 'nonplus.'" *Id.* at A132. In reaching this conclusion, the court "examine[d] the Plaintiffs' evidentiary showings, as they have grouped them, in three categories of generalized proof * * * — namely, opportunity and motive; behavior that is contrary to economic self-interest; and interfirm communications." *Id.* at A134. While the court "follow[ed] the Plaintiffs' lead in compartmentaliz[ing] its discussion of the evidence, it * * * carefully reviewed this evidence as a blended whole, * * * so as to ascertain whether an 'inference of conspiracy is reasonable in light of the competing inference of independent action.'" *Id.* at A134-A135 (quoting *Matsushita*, 475 U.S. at 588). Because the court determined that an inference of conspiracy "would consist of unreasoned speculation," it concluded that the motions for summary judgment should be granted. *Id.* at A135.

3. The en banc Eighth Circuit affirmed the grant of summary judgment. Pet. App. A3-A46. Stating the governing standard articulated in this Court's decisions, the court explained that, to survive summary judgment, plaintiffs proceeding under § 1 of the Sherman Act

> must present evidence that "tends to exclude the possibility of independent action" by the defendants. *Monsanto*, 465 U.S. at 768. This means that conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588. * * * Applied in this case, the standard requires that if it is as reasonable to infer from the evidence a price-fixing conspiracy as it is to infer permissible activity, then the plaintiff's claim, without more, fails on summary judgment.

Id. at A6-A7. As a consequence, the court concluded, "[a] plaintiff has the burden to present evidence of consciously parallel * * * pricing *supplemented with* one or more plus factors." *Id.* at A8 (emphasis in original).

Applying this standard to the record, the court held that petitioners had not made out their case. The court recognized that "a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy." Pet. App. A8. But the court found that the evidence of interfirm communications (so-called "price verification" contacts) "presented by the class [petitioners] here is far too ambiguous to support such an inference." *Ibid.* The court noted that "[t]here is no evidence to support the inference that the verifications had an impact on price increases" (*id.* at A10); that there were only a few dozen contacts taking place over "at least a seven-year period in which there would have been tens of thousands of transactions" (*id.* at A11); and that "the

communications here are facially innocent contacts which are, at most, ambiguous." *Id.* at A13. The court likewise acknowledged that "[e]vidence that defendants have acted against their economic interest can also constitute a plus factor" (*id.* at A16), but it found "nothing in this record" that can "be construed as an act against self-interest." *Id.* at A17. And the court declined to decide whether expert econometric "evidence, in a proper case, could constitute a plus factor, because we find the report [of petitioners' expert] in this case is not probative of collusion." *Id.* at A18.

Judge John R. Gibson, joined by four other judges, dissented. Pet. App. A19-A46. Like the majority, the dissent invoked the "tends to exclude" standard and endorsed a "'plus factors' test * * * as a way to distinguish between innocent interdependence and illegal conspiracy." *Id.* at A29. Examining the record here, however, Judge Gibson reasoned that "the additional evidence tends to exclude the possibility that the producers acted independently." *Id.* at A33. Pointing to interfirm communications, and rejecting the majority's characterization of particular pieces of evidence as ambiguous, the dissent accordingly concluded that "this list of 'plus factors' adds up to evidence that satisfies the *Monsanto* standard." *Id.* at A45.

REASONS FOR DENYING THE PETITION

According to petitioners, this Court's decisions in *Matsushita* and *Monsanto* have been a font of confusion and uncertainty. In petitioners' telling, the Eighth Circuit read *Matsushita* to make it virtually impossible for any antitrust plaintiff to survive summary judgment, thus contributing to a burgeoning conflict in the circuits concerning the meaning of the *Matsushita* standard. This overcaffeinated rhetoric, however, has no basis at all in reality. In fact, *Matsushita* and *Monsanto* articulated clear and sensible rules that have been *uniformly* applied by *all* the courts of appeals — including the

Eighth Circuit. Petitioners' real complaint concerns not the summary judgment standard, but the fact that both courts below found the record evidence to be far too ambiguous to be probative of the alleged antitrust conspiracy. Petitioners' fact-bound challenge to that determination is insubstantial; it plainly does not warrant this Court's review.

A. The Eighth Circuit Faithfully Applied *Matsushita*'s "Tends to Exclude" Standard

1. "[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply [to a] trial on the merits." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In the antitrust area, that substantive law is described by *Matsushita* and *Monsanto*, which explain that the governing rule "limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case." This means that

> *conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.* * * * To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence *"that tends to exclude the possibility" that the alleged conspirators acted independently.*

Matsushita, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764) (emphasis added). See Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 495 (1991) (*Matsushita*'s "holding concerning impermissible inferences is based on substantive antitrust law"). As Professor Areeda accordingly described the settled understanding of *Matsushita* and *Monsanto*, "summary judgment should be granted for the defendant unless the evidence as a whole would allow a reasonable fact finder to conclude not just that the evidence is consistent with a

conspiracy but that the alleged conspiracy is more probable than not"; "when the evidence is in equipoise * * *, summary judgment will be granted [to the defendant]." II P. Areeda & H. Hovenkamp, ANTITRUST LAW 70 (1995). See *id.* at 71-72.

Petitioners are incorrect in the view that they expressed before the court of appeals, and that they rather vaguely repeat in the petition (see Pet. 20-21), to the effect that the Court retreated from this understanding of *Matsushita* and *Monsanto* in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992). To be sure, the Court in *Kodak* stated that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." 504 U.S. at 468. That remark, however, referred not to *Matsushita*'s discussion of § 1 conspiracy law, but to its analysis of the application of ordinary summary judgment rules. *Matsushita* had applied the "settled principle[] that if the factual context renders [the plaintiffs'] claim implausible — if the claim is one that simply makes no economic sense — [the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. The defendant in *Kodak* had argued that it was entitled to the benefit of that rule because it had articulated an abstract economic theory supporting its position. See *Kodak*, 504 U.S. at 467. In rejecting that argument, the *Kodak* Court explained that *Matsushita* had not changed settled summary judgment law; it "did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Id.* at 468 (emphasis in original). Thus, upon finding that the defendant's economic theory did *not* reflect the reality of the marketplace, the Court in *Kodak* was obligated to affirm the reversal of summary judgment in the defendant's favor.

In contrast, the Court in *Kodak* never addressed, let alone purported to disturb, the *substantive* rule of antitrust law in conspiracy cases that requires plaintiffs to present evidence that "tends to exclude the possibility" of independent action. That phrase does not appear in the Court's opinion in *Kodak*. And that is not surprising, because the issue of the existence of a § 1 conspiracy was not before the Court in *Kodak*; the case involved allegations of illegal tying and monopolization. See 504 U.S. at 462.

Petitioners' current position on the meaning of *Matsushita* actually is somewhat obscure. Compare, *e.g.*, Pet. 15-16 (the plaintiff survives summary judgment if evidence "advances its case on some nonfanciful interpretation of the facts") with *id.* at 17 ("ambiguous" evidence may not defeat summary judgment). Petitioners' principal contention in the court of appeals was that the *Matsushita* "tends to exclude" standard applies only when the alleged antitrust conspiracy makes no economic sense. See Appellants' C.A. Br. 14-20. But that argument plainly was wrong; the Court in *Matsushita* took pains to *reject* the proposition that, "if [the defendants] had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. * * * [C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." 475 U.S. at 597 n.21. Petitioners therefore have abandoned the position they took in the court of appeals and now recognize that the "tends to exclude" standard applies in *all* § 1 cases. See, *e.g.*, Pet. 5, 17.

2. Given this vacillation in petitioners' position, their argument before this Court now appears to be that the Eighth Circuit somehow misunderstood the *Matsushita* "tends to exclude" standard. To establish this proposition, petitioners offer a lengthy and increasingly outlandish series of characterizations of the opinion below: they assert that it required antitrust plaintiffs to "directly establish the offer and

acceptance of a price-fixing agreement" (Pet. i); that it ruled that "inferences from disputed evidence will no longer be viewed in favor of the non-moving party" (*id.* at 5); that it permitted a court to "weigh circumstantial evidence as it sees fit" (*ibid.*); that it found petitioners' evidence insufficient because it "did not constitute offer and acceptance of a particular price-fixing agreement" (*id.* at 7); that it required antitrust plaintiffs "to exclude *all* possibility of independent action" (*id.* at 14 (emphasis added)); that it required plaintiffs to "prove their claims to the court, acting as a finder of fact" (*id.* at 22); and that it "makes it virtually impossible to maintain private actions against price-fixers without direct, smoking gun evidence." *Id.* at 27. In offering these improbable and hyperbolic assertions, petitioners expand on an argument advanced by the dissent below, which read the majority's opinion to "reject[] circumstantial evidence of conspiracy and require[] direct evidence." Pet. App. A20.

Notably, however, petitioners (and, for that matter, the en banc dissent) nowhere *quote* the Eighth Circuit as saying any of these unlikely things. And the reason for that omission is plain: those statements are a complete mischaracterization of the standard actually applied by the court of appeals. In fact, the Eighth Circuit expressly disclaimed that it was making "legal history" by insisting on direct proof of conspiracy, or by denying the relevance of circumstantial evidence. Pet. App. A6. Instead, the court of appeals took its standard verbatim from this Court's opinions, holding that antitrust plaintiffs must "present evidence that 'tends to exclude the possibility of independent action' by the defendants" (*ibid.* (quoting *Monsanto*, 465 U.S. at 768)); that "conduct that is 'as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy'" (*id.* at A6-A7 (quoting *Matsushita*, 475 U.S. at 588)); that "if it is as reasonable to infer from the evidence a price-fixing conspiracy as it is to infer permissible activity,

then the plaintiff's claim, without more, fails on summary judgment" (*id.* at A7); that "a plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors" (*id.* at A8 (emphasis in original)); and that summary judgment is appropriate when the nonmoving party "fail[s] to present evidence of collusion sufficient to create a genuine issue of material fact." *Id.* at A19.

The Eighth Circuit's approach thus did not, as petitioners would have it, require "direct" proof of conspiracy, or obligate antitrust plaintiffs to exclude *all* possibility of independent action. Quite the contrary: the court of appeals simply asked whether petitioners' evidence was more consistent with illegal conspiracy than with independent action. If it was not — that is, if the evidence was no better than in "equipoise" (II P. Areeda & H. Hovenkamp, *supra*, at 70) — it could not tend to exclude the possibility of independent action and summary judgment would be appropriate. This standard is entirely faithful to *Matsushita* and *Monsanto*. Petitioners accordingly direct their argument at a straw man when they contend that review is necessary because the Eighth Circuit's holding disregarded this Court's decisions.

B. The Courts Of Appeals Are Not In Conflict On The Meaning Of *Matsushita* and *Monsanto*

Petitioners demonstrate a similarly overactive imagination when they assert that the circuits are in conflict on the proper reading of *Matsushita* and *Monsanto*. See Pet. 5-6, 7-8, 17-21, 25-27. In fact, *every* circuit has quoted and faithfully applied an identical "tends to exclude" rule in § 1 conspiracy cases. See, *e.g.*, *Computer Identics Corp.* v. *Southern Pacific Co.*, 756 F.2d 200, 203 (1st Cir. 1985); *Clorox Co.* v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d

680, 685 (4th Cir. 1992); *Stewart Glass & Mirror, Inc.* v. *U.S. Auto Glass Discount Centers, Inc.*, 200 F.3d 307 (5th Cir. 2000); *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999); *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Tech., Inc.*, 123 F.3d 1107, 1112 (8th Cir. 1997); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094, 1096-1097 (9th Cir. 1999), cert. denied, 120 S. Ct. 1531 (2000); *Mitchael* v. *Instacorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158 F.3d 548, 570 (11th Cir. 1999); *Ostrzenski* v. *Columbia Hosp. for Women Found., Inc.*, 158 F.3d 1289, 1290 (D.C. Cir. 1998). The leading commentators also are in agreement. See II P. Areeda & H. Hovenkamp, *supra*, at 70-72.

In nevertheless arguing that the courts of appeals take differing approaches, petitioners contend that the Eighth Circuit "by its own admission[] issued a determination that conflicts with the rulings of other circuits." Pet. 5. In making this assertion, petitioners evidently have in mind the court of appeals' statement that "[w]e are among the majority of circuits to apply *Monsanto* and *Matsushita* broadly." Pet. App. A7 (citing *Corner Pocket of Sioux Falls* v. *Video Lottery Tech.*, *supra*). The court's statement, however, simply referred to its 1997 observation in *Corner Pocket* to the effect that, although earlier decisions of the Third and Ninth Circuits had been interpreted to hold that *Matsushita* applies only when the plaintiff's economic theory is implausible, most circuits "read *Matsushita* more broadly" to apply in *all* § 1 cases. *Corner Pocket*, 123 F.3d at 1109. Since then, the Third and Ninth Circuits have expressly acknowledged that *Matsushita*'s "tends to exclude" rule applies whether or not the defendants

had a plausible reason to conspire.[4] Indeed, as we note above, petitioners themselves appear to agree with this understanding of *Matsushita*. See page 12, *supra*. As a consequence, the "broad[]" approach to *Matsushita* discussed by petitioners actually is the approach uniformly taken by the courts of appeals.

That certainly is true of the Third, Seventh, and Eleventh Circuits, the courts that petitioners claim to have adopted a conflicting standard. See Pet. 7-8, 17-20, 25-27. Although petitioners are, again, exceedingly vague on the precise nature of the purported conflict, they appear to assert that these circuits will not grant summary judgment so long as the

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[4] Dicta in earlier decisions of those circuits could be taken to suggest that the "tends to exclude" approach applies only when the plaintiffs' theory is implausible as a matter of economics, as was true of the predatory pricing theory advanced in *Matsushita* itself. See *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990). See also II P. Areeda & H. Hovenkamp, *supra*, at 70 (describing *Petroleum Products* dicta as "[q]uite wrong"); Schwarzer, Hirsch & Barrans, *supra*, 139 F.R.D. at 492 n.283 (noting that *Petroleum Products* statement was dicta because that "was not a case * * * in which plaintiffs' entire case depended on an inference from a set of facts at least equally consistent with lawful conduct"). But more recent decisions of those courts have disavowed that cramped view of *Matsushita*. See *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) ("even with a plausible motive to conspire, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 123-124 (3d Cir. 1999) (applying "tends to exclude" standard to allegations of horizontal price-fixing); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094-1095, 1096 (9th Cir. 1999) (dismissing *Petroleum Products* language as dicta and applying "tends to exclude" standard to allegations of horizontal price-fixing).

plaintiffs' evidence is *consistent* with conspiracy, even if the evidence is ambiguous or in equipoise and therefore does not *tend to exclude* the possibility of independent action. See, *e.g.* Pet. 18 (these courts purportedly will leave case to the jury when there is "reasonable evidence probative of conspiracy"). On examination, however, it is apparent that petitioners simply have seized on unexceptional cases in which the courts found summary judgment inappropriate because, on records very different from the one in this case, the evidence in fact *did* tend to exclude the possibility of independent action. Certainly, the snippets from those decisions that are quoted by petitioners stand only for a handful of innocuous propositions — evidence must be construed in the light most favorable to the nonmoving party, antitrust plaintiffs need not provide direct evidence of conspiracy, plaintiffs are not obligated to prove their cases "to a 100-percent certainty," and so on (Pet. 18, 19-20, 26) — that were fully embraced by the court below. By the same token, the ultimate standard applied by those courts is identical to the one used by the Eighth Circuit.

The Third Circuit. Petitioners purport to find support for their claim of conflict in *Petruzzi's IGA Supermarket, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993). See Pet. 7, 19-20. In fact, however, the Third Circuit there held that simply establishing "a plausible conspiracy" does not permit a plaintiff to escape summary judgment unless the plaintiff also shows through unambiguous evidence that each defendant acted pursuant to an agreement. 998 F.2d at 1232-1233 ("the focus must remain on the evidence proffered by the plaintiff and whether that evidence 'tends to exclude the possibility that [the defendants] were acting independently'"). Although the Third Circuit found such proof as to two defendants where the record reflected *direct* evidence of conspiracy (including tape recordings of conspiratorial conversations) (see *id.* at 1233-1236), the court affirmed the grant of summary judgment as to a third defendant because

"we agree that the evidence put forward does not tend to exclude the possibility that [the defendant] acted independently." *Id.* at 1228.

Any doubt about the standard prevailing in the Third Circuit was dispelled by that court's more recent decision in *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999), a case that was relied upon by the court below (see Pet. App. A7-A8, A10, A11-A12) but is unaccountably ignored by petitioners. In that case — which, like this one, turned largely on allegations of improper pricing discussions between competitors — the Third Circuit *affirmed* the grant of summary judgment, emphasizing that

> [t]he extent of what constitutes a reasonable inference in the context of an antitrust case * * * is somewhat different from cases in other branches of the law in that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. * * * Therefore, the Supreme Court has held in the antitrust context "that conduct [as] consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. 752 at 764).

166 F.3d at 124. The court accordingly concluded that "care must be exercised to ensure that inferences drawn of unlawful behavior from ambiguous evidence do not infringe upon the defendants' freedom. * * * Thus, the court must ascertain whether the plaintiffs have presented 'evidence that is sufficiently unambiguous' showing that the defendants conspired." *Ibid.* (quoting *Matsushita*, 475 U.S. at 597).

That is precisely the standard applied by the Eighth Circuit in this case.[5]

The Seventh Circuit. Petitioners similarly miss the mark in asserting that the Seventh Circuit has adopted a differing standard. In fact, that court has long recognized that "there must be evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) (internal quotation marks omitted). The decisions cited by petitioners are not to the contrary. Petitioners thus emphasize that in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), the court recognized that a defendant may not obtain summary judgment simply by asserting that inculpatory evidence "is susceptible of an innocent interpretation." *Id.* at 614. But the court nowhere reached the opposite extreme by suggesting that the plaintiff may *defeat* summary judgment with evidence that is no more probative of conspiracy than it is of innocent conduct. To the contrary, in holding that summary judgment was not properly granted in *Brand Name Drugs*, the court characterized the plaintiffs' evidence as "tasty morsels" and "'smoking guns.'" *Ibid.* The Eighth Circuit

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[5] Petitioners also find no support in *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998), which they cite at Pet. 21 n.6. There, the Third Circuit expressly embraced the *Matsushita* "tends to exclude" standard (see 156 F.3d at 465-466) and emphasized that, "even with a plausible motive to conspire, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy." *Id.* at 466. Indeed, although the court held summary judgment inappropriate as to some defendants in *Rossi* because the evidence relating to them was unambiguous, it affirmed the award of summary judgment as to others because the plaintiff "failed to overcome his burden of showing that either [defendant's] actions tended to exclude the possibility of independent action on their part." *Id.* at 457.

distinguished *Brand Name Drugs* precisely because such "smoking gun" evidence is absent in this case. See Pet. App. A12-A13.[6]

The Eleventh Circuit. Finally, petitioners are wrong in relying on *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158

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[6] The other Seventh Circuit decisions cited by petitioners likewise do not support their assertion of a conflict. In *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999) (cited at Pet. 18, 21 n.7, 26-27), the court nowhere indicated that summary judgment must be denied whenever the evidence is equally consistent with conspiracy and with independent action; instead, the court found summary judgment inappropriate because the plaintiff had powerful proof of conspiracy, including "evidence of cartelization," "suspicious producer price behavior," and "the pretextual character of the reasons the [defendants] gave for the refusal to deal." 190 F.3d at 779. There is no equivalent evidence in this case. Indeed, the court in *JTC Petroleum* declined to address the plaintiff's direct evidence of conspiracy because "[i]t strikes us as equivocal" (*ibid.*) — something that is (at worst) also true of the petitioners' evidence here. As for *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781 (7th Cir. 1999) ("*Brands II*"), in the portion of the opinion discussed by petitioners (at Pet. 25-26) the Seventh Circuit, discussing entitlement to a directed verdict, indicated that an antitrust plaintiff may prove its case by showing that the defendants' "behavior could *better* be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action." 186 F.3d at 785 (emphasis added). See *id.* at 787 ("as the plaintiffs bore the burden of persuasion, it was necessary for them to present economic evidence that would show that the hypothesis of collusive action was *more* plausible than that of individual action") (emphasis added). That is, of course, the exact standard applied by the Eighth Circuit in this case. The court in *Brands II* also indicated that plaintiffs do not have to prove their case "to a 100-percent certainty" (*ibid.*); needless to say, the Eighth Circuit did not impose any such burden on petitioners here.

F.3d 548 (11th Cir. 1999). The Eleventh Circuit there expressly invoked the *Matsushita* "tends to exclude" standard (see *id.* at 569-570), explaining that defendants are entitled to summary judgment when "the plaintiffs' circumstantial documentary evidence is in equipoise." *Id.* at 569. See *ibid.* (summary judgment appropriate when evidence "as easily" supports innocent explanation as it does conspiracy). The court added that "the plaintiffs must show 'plus factors' that tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism." *Id.* at 572. The court found that standard satisfied as to two defendants because, on the record before it, the odds that the defendants' market behavior could be innocently explained were "minuscule." *Ibid.* Here, in contrast, neither court below found anything remotely similar in the record.

C. The Court Of Appeals Correctly Concluded That The Evidence In This Case Does Not Tend To Exclude The Possibility Of Independent Action

Against this background, petitioners' argument ultimately reduces to the assertion that the court of appeals erred in its *application* of the *Matsushita* standard to the record in this case. Pet. 23-25. On the face of it, of course, that fact-bound contention does not warrant this Court's attention. But even viewed on its own terms, petitioners' argument — which simply disregards the factual analysis of both courts below — is insubstantial.

First, petitioners devote most of their attention to sporadic contacts in which defendants provided information to one another about the prices at which they had made particular past sales of potash, asserting that those contacts were pervasive and suspicious. Pet. 6-7, 23-24. But the courts below found that the record supported no such conclusion. Addressing petitioners' principal theory — that respondents conspired to raise prices in 1987 — the court of appeals explained that the

price contacts "bear[] *no* relationship to the price increases most in question" because "the price verification communications only concerned charges on particular completed sales, not future market prices. There is no evidence to support the inference that the verifications had an impact on price increases. The only evidence is that prices were possibly cut as a result." Pet. App. A9, A10 (emphasis added). The court added that, given the historically low levels of potash prices in 1987, the DOC dumping investigation, the privatization of PCS, and the enactment of prorationing legislation by Saskatchewan, "it would have been ridiculous for the remaining companies to not [follow the price leadership of PCS and] also raise their prices in a parallel fashion." *Id.* at A11. In these circumstances, the courts below surely were correct in concluding that "the evidence presented by the class here is far too ambiguous to support * * * an inference of conspiracy." *Id.* at A8.

The court found the same to be true of the suggestion that respondents conspired to stabilize and maintain prices. The court noted that "[t]he price verifications relied upon were sporadic and testimony suggests that price verifications were not always given"; that there were only a few dozen interfirm contacts "over at least a seven-year period in which there would have been tens of thousands of transactions"; and that there "is absolutely no * * * evidence" that "the exchanges of information had an impact on pricing decisions." Pet. App. A11, A12. In this setting, where the price communications were "facially innocent contacts which are, at most, ambiguous on the question whether the producers schemed to set prices" (*id.* at A13), the evidence does not tend to exclude the possibility of independent action.

In arguing to the contrary, petitioners assert that, under *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), competitors never have a legitimate reason to disclose their pricing data. Pet. 6-7, 23-24. This Court, however, has

forcefully stated the opposite: "[t]he exchange of price data and other information among competitors * * * can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States Gypsum Co.*, 438 U.S. at 441 n.16. That conclusion is supported by both precedent and scholarly commentary.[7] Indeed, the Court in *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925), rejected a Sherman Act challenge to a systematic program of price exchanges that went far beyond anything alleged in this case. See *id.* at 603-606. Similarly, describing contacts that, again, go much further than the conduct alleged here, Professor Areeda explained that the "exchange [of] price information * * * does not imply a traditional conspiracy on price. * * * [T]he information or other contact does not itself imply any mutual assurances to use the information involved in any particular way." VI P. Areeda & H. Hovenkamp, *supra*, at 134. And that certainly is true in this case, where the district court found that the defendants' price contacts were attempts to verify assertions by customers that they had purchased potash in past transactions at particular prices — the very business justification that this Court recognized as legitimate in *Cement Mfrs.* See 268 U.S. at 605-606.

Second, petitioners rely on a memorandum from Canpotex (the lawful Canadian potash export association), dated January 8, 1988, which stated that "new price lists are being issued on Monday Jan. 11." Pet. App. A13. Petitioners read this reference to price "lists" as proof that respondents "coordinated the upcoming price rise," and insist that the Eighth Circuit used a "flawed analytical construct" in reaching

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[7] Such discussions, far from being evidence of an illegal commitment on price, occur routinely in interdependent industries and may serve a number of efficiency-enhancing purposes. See, *e.g.*, Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEORGETOWN L.J. 1187, 1191 (1979).

a contrary conclusion. Pet. 24; see *id.* at 10. As the court of appeals explained, however, the record does not reveal (and petitioners made no attempt to determine during discovery) "who received this 'smoking gun' piece of evidence." Pet. App. A15. And more fundamentally, petitioners' contention that the reference to "price lists" must evidence a conspiracy among all of the defendant potash producers is belied by the fact that on January 8, 1988, the day the Canpotex memorandum was written, PCS *publicly* announced its new prices for different grades of potash, stating in a telex to customers that the revised "[p]rice *lists* [would] be mailed Monday, January 11." Pet. App. A162 (emphasis added). This development confirms that the supposedly suspect memorandum referred to PCS's *unilateral* and announced decision to issue new price lists — a conclusion that is confirmed by the finding below that "the producers did *not* uniformly increase prices to match the memorandum on January 11, 1988, and furthermore, [that] one producer, Kalium, did not match the memorandum price at all." *Id.* at A15 (emphasis added). Again, then, the court of appeals was correct in holding that "the 'smoke' from this gun is barely, if at all, discernible." *Ibid.* See, *e.g.*, *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 903-904 (9th Cir. 1987) (Kennedy, J.) (reference to industry practice as a "gentleman's agreement" not sufficient to defeat summary judgment because several "interpretations" of the reference were possible and "[i]f a jury verdict were based on the 'gentleman's agreement' testimony, it necessarily would be speculative").

D. Even If The Court Were Inclined To Revisit Otherwise Settled Principles Of Antitrust Conspiracy Law, This Case Presents An Inappropriate Vehicle With Which To Do So

Finally, in the event the Court were interested in revisiting *Matsushita* and *Monsanto* — and, given the uniformity in the circuits, there is no reason it should — this case would not

present a suitable vehicle for doing so. The lawsuit contains several unusual features that make it highly atypical in crucial respects. And it is plain that petitioners could not prevail under any plausible standard. Further review therefore is not warranted for these reasons as well.

First, this case is out of the ordinary because it is undisputed that the governments of the United States and Saskatchewan took steps to *force* a substantial price increase. The DOC antidumping proceeding obligated respondents to raise their prices. The privatization of PCS required that firm — the dominant producer in the market — to raise prices and cut production. The Saskatchewan prorationing legislation made it a practical impossibility for other firms to undercut PCS's price. And the oligopolistic structure of the commodity potash industry induced all firms (defendants and nondefendants alike) to "follow-the-leader" in their pricing decisions, with every producer necessarily pricing at approximately the same level. See *Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.). This last point is proved by the decision of the other Canadian producers to follow PCS's lead in early 1988 and rebate the $35 surcharge imposed in September 1987; it hardly can be suggested that respondents conspired to give large *refunds*. In this setting, the price rise challenged by petitioners is completely explained by nonconspiratorial factors that are unlikely to be replicated in other cases.

Second, complex antitrust suits typically hinge on expert testimony concerning economics and market behavior. But petitioners' case is especially defective in that regard because both courts below found that their expert's testimony was essentially valueless. Indeed, the court of appeals discounted the opinion of petitioners' expert, both because his model "consider[ed] neither the privatization of PCS nor the anti-dumping proceedings" (Pet. App. A18) and because his report "relie[d] almost exclusively on evidence (such as the

producers' common membership in trade associations and their publication of price lists to customers) that is not probative of collusion as a matter of law." *Id.* at A18-A19. The court therefore dismissed the expert's opinion as "fundamentally unreliable." *Id.* at A19. As a consequence, petitioners' arsenal is lacking a key component that generally is critical to the success of antitrust plaintiffs. Indeed, we are unaware of *any* complex antitrust case that has gone to the jury without competent expert testimony.

Third, the close review of the record conducted by both courts below established that petitioners are relying on evidence that is, at best, "speculation" and "far too ambiguous" to be probative. Yet it is settled that antitrust plaintiffs may not defeat summary judgment by piling one atop another as many ambiguous and innocuous bits of evidence as they can find. As then-District Judge Becker explained the governing principle in rejecting a similar attempt by antitrust plaintiffs in *Matsushita*, "[n]othing plus nothing times nothing still equals nothing." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981), aff'd in part and rev'd in part, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574 (1986). That elementary rule of arithmetic dictates the outcome of this case as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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